

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

No. 74-1065

74-1065

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE,
INC., STATE OF NEW YORK, COUNTY OF NASSAU,
VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD,
SCHOOL DISTRICT NO.1, SADIE SCHWARTZ, D.C.R.
HOLDING CORP., HENRIETTA RAND, MARTHA
BARKUS and SHIRLEY HERSHKOWITZ,

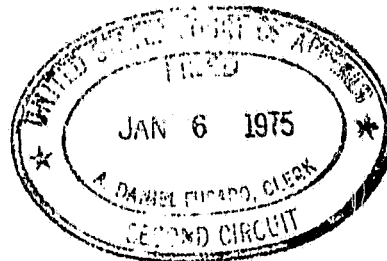
Defendants.

D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSHKOWITZ,
SADIE SCHWARTZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF NEW YORK

PETITION FOR REHEARING OF
DEFENDANT-APPELLANT D. C. R.
HOLDING CORP.



SCHIFFMACHER, CULLEN, ROCHFORD & FARRELL
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IN THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GENERAL DOUGLAS MacARTHUR SENIOR
VILLAGE, INC., STATE OF NEW YORK,
COUNTY OF NASSAU, VILLAGE OF HEMP-
STEAD, TOWN OF HEMPSTEAD, SCHOOL
DISTRICT NO. 1, SADIE SCHWARTZ,
DCR HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY
HERSHKOWITZ,

PETITION FOR
REHEARING

No. 74/1065

Defendants,

D. C. R. HOLDING CORP., HENRIETTA
RAND, MARTHA BARKUS and SHIRLEY
HERSHKOWITZ, SADIE SCHWARTZ,

Defendants-Appellants.

Defendant-appellant, D. C. R. Holding Corp., (hereinafter referred to as DCR), respectfully prays for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure. This Court, in an opinion dated the 11th day of November, 1974, Judge Gurfein dissenting, affirmed the order of the United States District Court for the Eastern District of New York, (366 F.Supp. 302) granting summary judgment

to co-defendants, County of Nassau, Village of Hempstead, and Town of Hempstead, dismissing the defendants-appellants cross claims for a refund of monies paid by them for the purchase of certain tax sale certificates representing tax liens of defendants, County of Nassau, Village of Hempstead, Town of Hempstead and School District No. 1, which encumbered the premises of defendant, General Douglas MacArthur Senior Village, Judgment of Affirmance was docketed in the Office of the Clerk of the District Court for the Eastern District of New York on the 9th day of December, 1974.

GROUND FOR THIS PETITION FOR REHEARING

DCR's cross claim is to recover the monies it spent to purchase from the Village of Hempstead, an unpaid tax lien which encumbered the property of General Douglas MacArthur Senior Village. Section 1464(3) RPTL states that if such a lien is not redeemed, the Village must convey the lien property to the lien holder subject only to claims of the Village, county or state for taxes, liens or encumbrances. Because of the foreclosure of a superior federal mortgage, the village could not convey the property which was encumbered by DCR's lien which, as a result, became worthless. It is admitted in the majority decision herein, that the federal mortgage is not one of those encumbrances mentioned in Section 1464(3) RPTL to which a conveyance by the Village would be subject. Despite this, three reasons were given for not

according to Section 1464(3) RPTL the strict interpretation for which DCR contended. DCR now argues that in advancing these three reasons, the Court misapprehended or overlooked certain salient facts and misapplied the applicable governing law of the State of New York.

REASONS FOR GRANTING THE PETITION

1. The Factual Hypothesis for the Court's First Reason for Affirming the Order of the District Court was Erroneous.

DCR's tax sale certificate is different from the certificates given to the other defendants-appellants because it contains no express contractual reservation that the lien is purchased subject to the superior tax liens of "Sovereignities". Neither the Notice of Sale of the Tax Liens of the Village of Hempstead, a copy of which is annexed hereto as Exhibit "A", nor the Tax Sale Certificate received by DCR, a copy of which is annexed hereto as Exhibit "B" contain a reference to an express reservation in favor of any "Sovereignities". The village tax lien was advertised and sold, and the Tax Sale Certificate was issued to DCR subject only to the statutory conditions contained in Section 1464(3) RPTL. The majority of this Court, however, stated as a reason for its affirmance of the order of the

District Court that these express reservations which, were in all the tax sale certificates except DCR's, is a recognition of sovereign claims that infers an implied exception in 1464(3) RPTL for federal liens comporting with custom and usage and basic business understanding. Rather, these express reservations would indicate that the liens of "Sovereignties" were not accorded priority under §1464(3) RPTL and an express reservation was needed to overcome, not only the statutory language, but also what was custom and usage and the basic business understanding. Accordingly, when a tax sale certificate is issued without any express reservations, the only conclusion that can be reached is that there is no intention to deviate from the Statute.

2. The majority decision misapplied the Law of the State of New York in its second reason for affirming the order of the District Court.

The second reason given in the majority decision for affirming the dismissal of DCR's cross claim is that since the Real Property Tax Law must operate harmoniously within a "federal system in which supremacy resides with the center," the legislature of the State of New York must have assumed that an exception existed in

§1464(3) RPTL in favor of the United States because the State lacks the power to subordinate a federal interest that is superior under federal law. Such reasoning infers that the legislature of the State of New York did not recognize the superiority of the federal interest in any other way. Actually, the primacy of a federal interest is recognized in the Real Property Tax Law. Section 402 RPTL accords tax exempt status to property of the United States. Section 422 RPTL* grants a tax exemption to real estate owned by a not for-profit, membership or limited profit corporation which is operated as a facility for the aged and organized pursuant to Articles 2, 7-A or 11 of the Private Housing Finance Law. Tax exemptions are not mandatory if the organization owning the property does not meet the standards of Section 422 RPTL but are optional with the municipality (See Sections 33* and 577* Private Housing Finance Law). Unfortunately, because General Douglas MacArthur Senior Village was not organized in accordance with the provisions of the Private Housing Finance Law it did not qualify for either the mandatory tax exemption of §422 RPTL or the optional exemptions of Sections 33 and 577 Private Housing Finance Law. While Douglas MacArthur Senior Village was not granted a tax exemption because of some organizational error or over-

* The applicable portions of these sections are set forth in Exhibit "C" hereof.

sight, that does not alter the fact that the legislature of the State of New York provided relief from local taxation for projects of the same character as General Douglas MacArthur and recognised the superior federal interest by granting, in Section 422 RPTL, full tax exemption to federally financed senior citizens facilities organized pursuant to Article 11 of the Private Housing Finance Law.

Not only did the majority decision misapprehend the law of the State of New York in creating an implied exception to §1464(3) RPTL in favor of the United States on the assumption that the legislature of the State of New York must have intended such an exception because it did not recognize the superiority of a federal interest by some other means, this Court, by holding that there was such an implied exception, violated every rules of statutory construction. The Courts of the State of New York have uniformly held that a taxing statute must be construed strictly against the taxing authority. Clason v. Baldwin, 192 N. Y. 204 (1897); Matter of Grumman Corp. v. Bd. of Assessors, 2 N. Y. 2d 500 (1957); Good Humor Corporation v. McGoldrick 289 N. Y. 452 (1943); Matter of Suffolk Co. Loan v. Bragalini, 5 N. Y. 2d 579 (1959); McKinney's Consolidated Laws of New York Vol. 1, Statutes §313. Delinquent tax sale procedure statutes are the subject

of a particularly literal construction against the municipality because the loss of ones property is deemed a harsh penalty for the non-payment of a tax. Helterline v. People, 295 N. Y. 245, (1946); Vivenzio v. City of Utica, 58 Misc. 2nd 571 (Sup. Ct. Oneida Co. 1969) aff'd. 33 A. D. 2nd 657 (4th Dept. 1969); Werking v. Amity Estates, 2 N. Y. 2nd 43 (1956); McKinney's Consolidated Laws of New York, Vol. 1, Statutes §313(d) p 485.

DCR by purchasing its tax lien has, in effect, paid the taxes on the property of General Douglas MacArthur Senior Village. It has complied fully with the provisions of the Real Property Tax Law. Yet, the majority of this court has expressly refused to apply the strict rule of statutory construction to which DCR is entitled. It has, instead, extended Section 1464(3) RPTL to cover a situation that it assumed, incorrectly, the legislature of the State of New York had neglected. In so doing it has worked a forfeiture of the funds DCR paid for the tax lien it purchased and meted out to one who complied with the law the same harsh penalty that the courts of the State of New York have tried to avoid by construing taxing and tax delinquency statutes strictly against the taxing authority.

3. §1464(3) RPTL envisions a conveyance as the natural result of a valid and legal but unredeemed tax lien.

The third reason for the courts affirmance was that §1464(6) RPTL prescribed a refund under certain conditions (error, illegality or invalidity) and since no provisions was made for a situation such as the instant case, it must be assumed that it was not the intent of the legislature to require a refund of the monies paid for a valid legal and subsisting tax lien.

The Real Property Tax Law and its predecessor statutes is a comprehensive delinquent tax lien procedure designed to rectify the deficiencies of common law. Protection was afforded the tax lien purchaser if the lien was illegal, erroneous or invalid. If the lien was valid and unredeemed the tax lien purchaser was entitled to the property. Superior federal mortgages were not considered because exemptions were provided for the realty they could be expected to encumber. Whether it is called an implied warranty of priority or a statutorily created priority, there can be no doubt that the New York delinquent tax lien procedures were a complete departure from common law in that the tax lien purchaser was completely protected and not left to the vagaries of caveat emptor. No specific provision was made for the situation here presented in §1464 RPTL

because the exemption statutes were thought to be adequate.

If §1464(3) RPTL requires the Village to convey DCR's title to the demised premises in fee simple subject only to village, county and state liens, DCR is entitled to specific performance. Since the Village cannot perform the parties must be restored to their original positions. DCR is entitled to a refund.

4. The Doctrines of Contractual Frustration or Impossibility of Performance fit the facts of this case.

The majority, in its discourse on contractual frustration and impossibility, states that the argument "fails under either heading because it is such a confused mix of both". This would seem to imply that if the argument fell into either category it would be successful but because it combines the elements of both it is inadequate. Certainly, DCR is not to be denied a remedy because the facts of the case do not fall into prescribed pigeonholes.

Furthermore, contrary to the majority decision, the doctrine of contractual frustration does not come into play only if there is a cataclysmic event. It is sufficient if the occurrence is an unforeseen circumstance beyond the contemplation of either party - such as happened here. Ewing Co. v. N. Y. State Teachers Retirement

System, 14 A. D.2d 113 (3rd Dept. 1961) aff'd. 11 N. Y. 2nd

749, 407 East 61st Garage, Inc. v. Savoy Corp. 23 N. Y. 2nd

275, 282 (1968).

5. A Tax Lien Purchaser Cannot Protect Himself by
Searching Title.

The majority decision concludes with the admonition that a tax lien purchaser must search title to any property before he bids on a tax lien that encumbers it, in order to protect himself against loss. As defendants appellants have heretofore explained on this appeal, the court's recommendation is unrealistic because the nature of the tax lien sale makes it practically impossible to conduct such a search. Moreover, if a search were conducted in this case and the federal mortgage turned up, as certainly it should have been, if the search were competantly done, it is doubtful if DCR could have been any better off. 12 USC Sections 1706b, 1714, 1741, 1747 and 1750e subject property held in accordance with the sub-chapters of which those sections form a part to local taxation. This waiver of the priority right of federal property was extended in Dime Savings Bank v. Beecher, 23 A. D.2d 297 (2nd Dept. 1965), app. dism'd. 17 N. Y. 2d 725, aff'd. 18 N. Y. 2d 763 to a federal judgment entered upon the foreclosure of a federal mortgage and, by implication to federal

mortgages. (See also Dime Savings Bank v. Buscemi, 50 Misc.2d 495 (Sup. Ct. Nassau Co. 1966); Jamaica Savings Bank v. Zeus Capital Ltd. 67-1 U.S. Tax Cases No. 9120 (E. D. N. Y. 1966)). So, even if a search had disclosed the federal mortgage in this case, DCR would have had to know whether the mortgage was one where the United States waived its priority position or one that did not come within the purview of these waiver statutes. In recent years the United States has waived its priority position in an ever increasing number of cases, witness the passage of the Federal Tax Lien Act of 1966 (26 U.S.C. §6323) as well as the aforementioned waiver statutes. Under such circumstances it would not be unreasonable to assume that the mortgage encumbering General Douglas MacArthur Senior Village, since it was authorized in the same chapter of Title 12 U.S.C. as the aforementioned waiver statutes and was not a lien on exempt property, was one which did not have the benefit of federal priority.

The New York delinquent tax statutes were enacted to make tax liens more marketable by avoiding the necessity of a title search that the precedent tax lien purchaser who bought at his own risk would have undertaken under the common law. If it now becomes incumbent upon the tax lien purchaser to search title before bidding, the whole purpose of Section 1464(3) is thwarted.

CONCLUSION

For the reasons hereinbefore set forth, DCR requests that this petition for rehearing be granted and that this court reconsider its decision affirming the order of the District Court.

Dated: Great Neck, N. Y.
December 23, 1974

Respectfully submitted,

SCHIFFMACHER, CULLEN, ROCHFORD
& FARRELL

By: John M. Farrell (A Partner)
Attorneys for Petitioner D. C. R. Holding Corp.
98 Cutter Mill Road
Great Neck, New York 11021

VILLAGE OF HEMPSTEAD
NOTICE OF SALE OF
REAL ESTATE FOR UNPAID
VILLAGE TAXES FOR THE
YEAR 1969 / 70

1
NOTICE IS HEREBY GIVEN:
that pursuant to the provisions
of the Real Property Tax Law
of the State of New York and
of a resolution of the Board of
Trustees of the Village of Hemp-
stead, Nassau County, New York,
adopted at a meeting thereof
held on the 6th Day of January,
1970, I, Andrew S. Pitre, Village
Clerk-Treasurer of the said Village
of Hempstead, will sell at public
auction in the manner provided
by law, on the 4th day of May,
1970, at ten o'clock in the fore-
noon at the Village Offices, 99
Nichols Court, in the Village of
Hempstead, County of Nassau
and State of New York, so much
of each of the following parcels
of real estate upon which Village
Taxes remain unpaid as will be
sufficient to discharge the tax,
fees, interest and charges which
may be due thereon respectively
at the time of such sale, and shall
continue the same from day to
day until the said sale shall be
completed.

The purchaser or purchasers at
such a tax sale will be required to
pay the amount of their respect-
ive bids to the undersigned Vil-
lage Treasurer, within ten days
after the sale, pursuant to Section
1454 of the Real Property Tax
Law of the State of New York,
as amended, and upon such pay-
ment shall receive a written cer-
tificate of sale describing the real
estate purchased and the sum
paid therefor.

NOTICE IS FURTHER GIVEN
that this sale is subject to U.S.
Soldiers' & Sailors' Civil Relief
Act, as amended and to New
York State Soldiers' & Sailors'
Civil Relief Act, as amended.

The following is a list of the
parcels of real estate to be sold,
as listed according to Nassau
County Section, Block and Lot,
description, together with a state-
ment of the amount of the tax,
fees, interest and charges thereon
to May 4, 1970, to wit:

EXHIBIT "A"

INCORPORATED VILLAGE OF HEMPSTEAD
HEMPSTEAD, NEW YORK

Certificate

TAX SALE CERTIFICATE

No.18..... 1969

ISSUED UPON THE SALE OF THE
PROPERTY FOR 1969 VILLAGE TAX
PURSUANT TO SECTION 126-D OF THE VILLAGE LAW
OF THE STATE OF NEW YORK

Village Clerk

I, Andrew S. Pitre, Treasurer for the Incorporated Village of Hempstead, Nassau County, New York, do hereby certify that a public auction held by me on the 4th day of May, 1970 at the Village Offices in said Village, No. 99 Nichols Court, Hempstead, N.Y., in pursuance of Section 126-d of the Village Law of the State of New York and of a resolution of the Board of Trustees of said Incorporated Village of Hempstead duly adopted on the 6th day of January, 1970.....
January,

.....D.C.R. Holding Corp.....

purchased the following described premises:-

260 CLINTON ST

34-245-575

6

for which said premises said purchaser paid the respective amount(s) at which said premises were offered for sale pursuant to the Official Tax Sale Notice, being \$...20,228.11.....

Said premises have been sold subject to any unpaid assessments thereon levied by said Incorporated Village of Hempstead prior to....none.....
and any unpaid tax liens held by said Village for years prior to....none.....
Dated this 4th day of May, 19 70

Andrew S. Pitre
.....
Village Clerk - Treasurer
Incorporated Village of Hempstead, New York

COUNTY OF NASSAU }
STATE OF NEW YORK } ss.:

On this 4th day of May, 1970 before me personally came Andrew S. Pitre, to me known and known to me to be the Treasurer of the Incorporated Village of Hempstead, the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

MARY ELLEN PROFIS
NOTARY PUBLIC, State of New York
No. 202-15700
Qualified in Nassau County
Cert. to Exp. in Nassau County
Term Expires March 30, 1971

Mary Ellen Profis
.....
Notary Public, Nassau County, New York

1500-3 '67/e..

§ 422. Not-for-profit housing companies

1. (a) Real property owned by a not-for-profit corporation organized pursuant to the not-for-profit corporation law and the provisions of article two of the private housing finance law, used exclusively to provide housing and auxiliary facilities for faculty members, students, employees, nurses, interns, resident physicians, researchers and other personnel and their immediate families in attendance or employed at colleges, universities, educational institutions, child care institutions, hospitals and medical research institutes, or for handicapped or aged persons of low income, or owned by non-profit nursing home companies organized pursuant to the not-for-profit corporation law and the provisions of article twenty-eight-A of the public health law, used exclusively to provide facilities for nursing care to sick, invalid, infirm, disabled or convalescent persons of low income, or to provide health-related service as defined in article twenty-eight of the public health law to persons of low income, or any combination of the foregoing, and in addition thereto, to provide nursing care and health-related service, or either of them, to persons of low income who are not occupants of the project, or owned by housing development fund companies organized pursuant to the not-for-profit corporation law and article eleven of the private housing finance law, used exclusively to provide housing for handicapped or aged persons of low income, and financed by a federally-aided mortgage as defined in said article eleven, or owned by companies organized pursuant to the not-for-profit corporation law and the provisions of article seventy-five of the mental hygiene law, used exclusively to provide care, treatment, training, education and residential accommodations for operation as hostels for the mentally ill or mentally retarded, or owned by companies organized pursuant to the membership corporations law and the provisions of article seven-A of the private housing finance law, used exclusively to provide programs, services and other facilities for the aging, shall be exempt from taxation and exempt from special ad valorem levies and special assessments to the extent provided in section four hundred ninety of this chapter. No such corporation or company shall pay a dividend on any of its stock or pay interest on any of its debentures.

§ 33. Tax exemptions

1. (a) Upon the consent of the local legislative body of any municipality in which a project is or is to be located, the real property in a project shall be exempt from local and municipal taxes, other than assessments for local improvements, to the extent of all or part of the value of the property included in such project which represents an increase over the assessed valuation of the real property, both land and improvements, acquired for the project at the time of its acquisition by the limited-profit housing company, provided, however, that the real property in a project acquired for purposes of rehabilitation shall be exempt to the extent of all or part of the value of the property included in such project, and further provided that the amount of such taxes to be paid shall not be less than ten per centum of the annual shelter rent or carrying charges of such project except that for projects located or to be located in a city of a population of one million or more, upon the consent of the local legislative body of the municipality, the amount of such taxes to be paid may be set at not less than (i) the taxes payable with respect to the real property in such project with respect to the year nineteen hundred seventy-three, or, (ii) if such project was not occupied in such year, not less than ten per centum of the annual shelter rent or carrying charges first established pursuant to subdivision one of section thirty-one of this article. Shelter rent shall mean the total rents received from the occupants of a project less the cost of providing to the occupants electricity, gas, heat and other utilities. The tax exemption shall operate and continue so long as the mortgage loans of the company are outstanding, but in no event for a period of more than thirty years, commencing in each instance from the date on which the benefits of such exemption first become available and effective.

§ 577. Tax exemptions

1. (a) Whenever a housing project of a housing development fund company is or is to be permanently financed by a municipally-aided, state-aided or federally-aided mortgage, the local legislative body of any municipality in which such project is or is to be located may exempt the real property in such project from local and municipal taxes including school taxes, other than assessments for local improvements, to the extent of all or part of the value of the property included in the completed project. The tax exemption shall operate and continue for so long as the municipally-aided, state-aided or federally-aided mortgage is outstanding, but in no event for a period of more than forty years, commencing in each instance from the date on which the benefits of such exemption first became available and effective.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,
Plaintiff-

-against-

Index No.
74/1065

GENERAL DOUGLAS MacARTHUR SR. VILLAGE,
INC. STATE OF NEW YORK, COUNTY OF NASSAU,
VILLAGE OF HEMPSTEAD, et al

AFFIDAVIT OF
SERVICE BY MAIL

Defendants,

D. C. R. HOLDING CORP., Henrietta Rand,
et al

Defendants-Appellants.

-----x
STATE OF NEW YORK :
: ss.:
COUNTY OF NASSAU :

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age
and resides at 85-18 262nd Street, Floral Park, New York 11001

That on the 23rd day of December , 1974, deponent served
two copies of
/ the annexed PETITION FOR REHEARING

on the following in the capacities indicated and at the address indicated:

Saul Horowitz, Esq., 250 Fulton Avenue, Hempstead, N. Y.
attorney for the Village of Hempstead,

Michael P. Gurlides, Esq., 194 Old country Road, Mineola, N. Y.
Attorney for the Estate of David Rand

Stanley Beals, Esq., 380 North Broadway, Jericho, New York
Attorney for Sadie Schwartz

W. Kenneth Chave, Jr., Esq., Hempstead Town Hall, Hempstead, N. Y.
Attorney for the Town of Hempstead

John F. O'Shaughnessy, Esq., County Attorney of Nassau County, Nassau
County Executive Building, Mineola, New York, Attorney for the County
of Nassau

the address designated by each said attorney for that purpose by depositing true copies of same enclosed in postpaid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States post office department within the State of New York. *at 5:00 p.m.*

Margaret Newman
Margaret Newman

Sworn to before me this

23rd day of December, 1974.

John M. Farrell Jr.

JOHN M. FARRELL, JR.
NOTARY PUBLIC, State of New York
No. 30-0330650
Qualified in Nassau County
Commission Expires March 30, 1976